No. 15,864

IN THE

United States Court of Appeals

For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

REPLY BRIEF FOR THE APPELLANT.

JAMES M. FITZGERALD,
City Attorney, City of Anchorage,
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Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

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INTRODUCTION.

This is a reply brief. Appellant shall not attempt to repeat or restate the arguments already set forth in the main brief. However, as appellee has raised a jurisdictional question unsupported by the record, appellant finds it necessary to include two documents in the appendix to this brief. These documents are (1) a copy of the docket entries in City of Anchorage v. Hilton and (2d) a notice of entry of judgment. It is felt that this procedure is necessary in order to refute appellee's statement as to lack of jurisdiction, as the present transcript and record is an agreed statement on record and appeal and does not show the two documents mentioned.

ARGUMENT.

Appellee's brief raises for the first time, and unsupported by the record, the question of jurisdiction, urging that the appellant's notice of appeal was not timely filed. (Appellee's brief, page 1.) Appellee urges the case of *Matteson v. United States,* 240 F. 2d 517 in support of his position. In the above cited case the jurisdiction in question was raised by a motion to dismiss. The above cited case is sound, based on the state of facts that existed, however, the facts in this case are substantially different. It should be noted that this case is before the United States Court of Appeals for the Ninth Circuit on an agreed statement as record on appeal. (Tr. p. 3.) On page 8 of the transcript the judgment that was entered in the District Court appears, followed by the notice of appeal, the dates appearing on the documents. Appellee says in his brief: "The opinion and decision of the District Court filed and entered on the 4th day of October, 1957 was final and decisive, and is set forth on pages 5-7 of the transcript." (Appellee's brief, page 1.) It should be noted that there is no mention made of this fact in the agreed statement as the record on appeal. (Tr. p. 3 and following.) There is no mention made that anything other than the judgment that appears on page 8 is the judgment from which the appeal was taken. (Tr. p. 8.) There are further reasons why appellee's argument and challenge to the jurisdiction must fail. They are as follows:

Rule 58 of the Federal Rules of Civil Procedure provides in part, "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment, and the judgment is not effective before such entry." A copy of the docket entries made in the District Court in this cause indicates that on October 4, 1957 an opinion was entered and on the next line it indicates that on October 28, 1957 the judgment of dismissal without costs to either party was entered. Although the court, in *Matteson v. United States* (Ibid. p. 518) goes into the provisions of Rule 58, it does not indicate one way or the other whether a docket entry of judgment was entered after the opinion. If the opinion was meant to be the judgment in this case, then the Clerk, appellee here, failed to follow the provision of Rule 58 and failed to enter judgment as he was required to by the Rule. If then, the opinion was the judgment, although neither party treated it as such, then can the appellee rely on his own failure to follow the Federal Rules in urging that the filing of the notice of appeal in this case was not within the prescribed time? The judgment is considered as final and perfect for appeal purposes when entered by the Clerk. (*In re Hurley Mercantile Co.*, 56 F. 2d 1023 cert. denied *Atascosa County State Bank of Jourdanton, Texas v. Coppard,* 52 S. Ct. 580, 286 U. S. 555, 76 L. Ed. 1290.) The "docket" indicates judgment entered on 28th day of October, 1957. (Appendix, page iii.)

The second document in the appendix is a copy of the notice of entry of judgment as signed and sent out by the Clerk of the Court for the District Court of Alaska for the Third Judicial Division. This notice of entry of judgment is in accordance with the local practice in the Third Division. This notice was sent out following the entry of judgment on October 28, 1957. Appellee apparently thought he was entering a judgment on October 28, 1957 and sent out the notice in accordance with the local practice. Appellant, assuming that the notice of entry of judgment sent out by the appellee was correct then filed his notice of appeal on November 12, 1957, within the required time for taking an appeal to this court. Appellee's argument that this court lacks jurisdiction is without merit, unless perhaps appellee is suggesting that because appellee is in this case a party litigant, he can receive a judgment, docket the same as a judgment, send out a notice that judgment has been entered, while wearing the hat of Clerk of Court, but then for purposes of dismissing an appeal while wearing the hat of a litigant, can urge that the opinion filed on October 4, 1957 was really the judgment and therefore the notice of appeal taken by filing the same on November 12, 1957 was not timely.

It is further urged that in reading the *Matteson* case (Ibid.), it appears there is some conflict between the Circuits as to this ruling. A reading of the opinion alone does not give the necessary facts to put it

on all fours with the factual situation in the instant case, therefore, appellant urges that the appeal was timely and the court has jurisdiction.

Appellee's brief, page 6, says, "The very question here involved was submitted by the Director of the Administrative Office of the United States Courts to the Comptroller General of the United States." Appellee then refers to a letter from the Comptroller General of the United States. Appellant urges that this inclusion is improper. Neither the Comptroller General nor the Administrative Office of the United States courts are parties to this suit. It is urged that these letters and the opinions expressed therein are self serving statements written in an advisory capacity and should not be considered by this court in the determination of this appeal. The Comptroller contends (Appellee's brief, pages 9-10) that the City's position as to the disposition of fines is based on 16-1-35 ACLA 1949, as amended by 44 Session Laws 1953. This seems to leave the impression that if the Territorial Legislature passed such an act as it did and if this were interpreted to mean that fines imposed, whether they be in the Magistrate's Court or in the District Court, belong to the City, the Legislature would not be acting within the scope of its power, because of Section 9 of the Organic Act. However, appellant has already pointed out (Appellant's opening brief, page 15) that the act we rely on, 33 Stats. 529, Chapter 1778, is an Act of Congress and did not originate as an act of the Territorial Legislature.

CONCLUSION.

For the reasons stated in the appellant's opening brief, it is submitted that the District Court's judgment should be reversed.

Dated, Anchorage, Alaska,
May 1, 1958.

Respectfully submitted,

JAMES M. FITZGERALD,
City Attorney, City of Anchorage,
L. EUGENE WILLIAMS,
Assistant City Attorney, City of Anchorage,
EDWARD A. MERDES,
City Attorney, City of Fairbanks,
JOHN SHAW,
City Attorney, City of Palmer,
SEABORN J. BUCKALEW,
City Attorney, City of Seward,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

A-13,425

Date	Filings—Proceedings	Amount reported in emolument returns
5-24-57	Filed Complaint	
6- 4-57	Re Representation of Defendant by U. S. Attorney J 53/29	
6-24-57	Issued Summons	
6-27-57	Filed Summons	
" " "	" Marshal's Return—6/25/57	
7- 2-57	" Answer	
7-11-57	Filed Stipulation (Agreed Statement of Facts)	
7-11-57	M. O. Setting Time for filing briefs. Opening brief in 2 weeks or by 7/25/57. Answering brief to be filed 2 weeks thereafter or by 8/8/57 and reply brief 2 weeks after answering brief or by 8/22/57	
7-22-57	Filed Brief in Support of Plaintiff's Claim for Relief	
8- 1-57	Filed Stipulation (Defendant Granted an Extension within which to file Answer Brief (to Sept. 1, 1957))	
8-10-57	Filed Reply Brief of Defendant	
8-15-57	Filed Reply Brief of Plaintiff	
10- 4-57	" Opinion	
10-28-57	Filed Judgment—dismissed w/o costs to either party J 55/213 case closed	3

Date	Filings—Proceedings	Amount reported in emolument returns
11-12-57	Filed Notice of Appeal (Copies)	5
11-12-57	Filed Bond for Cost on Appeal ($250.00—in bond file)	
12-18-57	Filed Motion to Extend Time to Docket Appeal	
12-20-57	Filed Order (time for docketing appeal extended to and including Jan. 31, 1958) J 56/204	
1-20-58	Filed Statement as Record on Appeal Earn. Dec. 31, '57 $5.00	
3- 5-58	Filed Transcript of Record Ninth Circuit Court of Appeals)	

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 21st day of April, 1958.

Wm. A. Hilton,
Clerk of the District Court.
By Clara Rhodes, Deputy.

In the United States District Court
for the District of Alaska

Third Division

No. A-13,425

City of Anchorage, a municipal corporation,
Plaintiff,

vs.

Wm. A. Hilton,
Defendant.

NOTICE OF ENTRY OF JUDGMENT

To Mr. James M. Fitzgerald,
Attorney, City of Anchorage.

Please take notice that judgment in the above entitled cause was entered in the office of the Clerk of the above entitled court on the 28th day of October, 1957.

Dated at Anchorage, Alaska, this 4th day of November, 1957.

Wm. A. Hilton, Clerk,

By .....
Deputy.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 21st day of April, 1958.

Wm. A. Hilton,
Clerk of the District Court.
By Clara Rhodes, Deputy.